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IN THE

Supreme Court of the United States

October Term, 1961

CHARLES R. JORDAN
Petitioner

VERSUS

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on the October 12, 1961.

OPINIONS BELOW

The first time this case was tried in the District Court, it resulted in mistrial. The oral opinion of the District Court is unreported. It appears at pages 9 and 10 of the printed record. The oral opinion of the District Court in the Second trial is unreport-

ed. It appears at pages 5 and 6 of the printed record. The opinion of the Court of Appeals is not yet reported, and is made a part hereof, as an appendage.

JURISDICTION

The judgment of the Court of Appeals was entered on the 12th day of October, 1961, appended. The jurisdiction of this Court is invoked under 28 U.S.C, Section 1254 (1) and Title 28, U.S.C.A., Supreme Court Rules, Rule 19. Section one (1), Subsection b.

QUESTIONS PRESENTED

1. Does a defendant, charged with an offense against the laws of the United States of America, have a fair and impartial trial, by an impartial jury, when his first trial before the jury resulted in a mistrial; he being again tried, for the same offense, before the same jury panel, with the exception of six (6) new additional jurors, duly called for jury service, on such jury panel; and that thirteen (13) other defendants were tried by the same jury panel, charged with the same, or similar, offenses; and four (4) government witnesses, who testified for the government, against the defendant, in both trials, also testified for the government in one or more of the trials of the 13 defendants, all of whom were found guilty under such testimony.

2. Does a defendant have a fair and impartial trial when the Trial Court takes over the questioning of government witnesses and bolsters their credibility to the jury, particularly after such witness had already testified, as a government witness, in other narcotic trials before the same jury panel, such questions being incompetent, irrelevant and prejudicial.

3. Is the Supreme Court of the United States precluded

from entertaining an objection, when a defendant fails to exercise any challenge for cause, and when only one-half of his preemptory challenges were used, taking into consideration all of the facts and circumstances set forth in Propositions One and Two. Do these facts and circumstances constitute *plain error*, nulifying the necessity for exception.

CONSTITUTION AND STATUTES INVOLVED

The pertinent constitutional provision is Constitution U.S.-C.A., Sixth (6th) Amendment.

AMENDMENT VI — JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The pertinent statutory provision is, Title 18, U.S.C.A., Rule 52, subsection (b), Rules of Criminal Procedure.

RULE 52. HARMLESS ERROR AND PLAIN ERROR.

(b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

The petitioner herein was charged in two counts by criminal indictment filed January 11, 1961, with violations of 26 U.S.C. 4704(a) and 26 U.S.C. 4705(a), which violations allegedly took place on December 2, 1960. (R. 3) The indictment states that on or about this date, the petitioner did purchase and then sell

to one Raymond Potter a number of morphine sulphate tablets. The petitioner was brought to trial on February 10, 1961, (R. 7), which proceeding resulted in a mistrial due to that jury not being able to agree on a verdict. (R. 9, 10)

During this same jury term in the United States District Court for the Northern District of Oklahoma this panel heard and convicted some thirteen defendants, other than the petitioner, on narcotics indictments greatly similar if not identical to the one brought against the petitioner. Further, the witnesses used by the government in these trials to establish those defendants' guilt were to a large extent identical to those used in petitioner's trial. Specifically, in the conjoint trial of cases numbered 13630, 13631, and 13586 wherein some seven defendants were tried on narcotics indictments on February 8, 9, and 10, 1961, the jury based its verdict of guilty on the testimony of government witnesses which included: Charles D. Casey, the Federal Narcotics Agent; Cliff W. Roberts, the Oklahoma Narcotics Agent; and George Donaldson, Jr., an addict-informer. Further, in the trial case number 13632 wherein some five defendants were tried on narcotics indictments on February 6, 7, 8, 1961, the jury based its verdict on the testimony of government witnesses which included Charles D. Casey and Cliff W. Roberts, the Federal and State Narcotics Agents. Again, in the trial of case number 13625 wherein one defendant was tried on a narcotics indictment on February 10, 1961, the jury based its verdict of guilty on the testimony of government witnesses which included one Raymond Potter, an addict-informer. These same four witnesses heretofore named

were the same witnesses used by the government to establish the alleged guilt of the petitioner.

On February 22, 1961, petitioner filed a Motion for Continuance and a Motion of Quash Jury Panel (R. 4) stating therein his objections to being re-tried before this same jury panel. (R. 4)

On February 24, 1961, the petitioner's case was called for trial. (R. 10) At that time petitioner's objections to being tried before the jury panel in the form of a Motion to Quash the Jury Panel was overruled by the trial court. (R. 11) Thereafter, in the regular course of the trial, twelve jurors were selected and sworn to try appellant's case. (R. 8) These twelve jurors were drawn from the jury panel objected to by petitioner with the exception of six new members to the panel. (R. 10)

The members of the jury which were sworn to try this case consisted of four of the new members to the panel, the remaining eight being from the panel objected to by the petitioner. Of those eight members, six had sat on juries which had previously convicted the other defendants heretofore mentioned on narcotics indictments based upon the testimony of the government witnesses as heretofore specified. Specifically, jurors Anderson, Wadley, Reis and Spratt were new members to the jury panel; jurors Spielman and Karleskint had not sat on those juries which had convicted the other defendants on narcotics indictments. Jurors Gambrill, Bryon, Barnes and Sinclair (Foreman of petitioner's jury) were members of the jury in the conjoint trial of cases numbered 13630, 13631, and 13586 wherein seven defendants were con-

victed upon tetimony which included that of government witnesses Casey, Roberts and Donaldson as heretofore specified. Juror Watson was a member of the jury in case number 13632 wherein five defendants were convicted upon testimony which included that of government witnesses Casey and Roberts. Juror Markley was a member of the jury in case number 13625, wherein one defendant was convicted upon testimony which included that of government witness Raymond Potter.

The petitioner was convicted on both counts of the indictment on February 24, 1961. (R. 5) Thereafter, on March 1, 1961, sentence was imposed by the Honorable Royce H. Savage, Judge of the United States District Court for the Northern District of Oklahoma. (R. 9) It was adjudged by that Honorable Court that the petitioner be sentenced to ten (10) years on each count, the sentences to run concurrently. (R. 9)

REASONS FOR GRANTING THE WRIT

I.

It is contended by petitioner, Charles R. Jordan, that his constitutional rights to a fair and impartial trial were violated when the Honorable Trial Court overruled his Motion for Continuance and Motion to Quash the jury panel. These motions were predicated upon the facts that his case had already been tried before the same jury panel which had resulted in a mistrial; and that numerous other defendants had been tried for the same, or similar, offenses, before the same jury panel; that by reason thereof, it is, and would be, impossible to obtain a jury which had

no knowledge, or prior opinions, concerning the transactions which were at issue in petitioner's case. The Motion for Continuance and the Motion to Quash the Jury Panel are reflected on page four (4) of the record.

It is noted that the Motion for a Continuance and the Motion to Quash the Jury Panel failed to show, or assign, as grounds for the granting thereof; that four (4) government witnesses, who were to testify at petitioner's trial, had all previously testified in one or more cases, before the same jury panel, involving cases where defendants had been charged with the same or similar offenses; and that all of said defendants were found guilty under such testimony.

It is contended that even though these facts were not brought specifically to the Trial Court's attention, that the Trial Court, from its own personal knowledge, knew of such circumstances, and should have taken percautionary measures to protect petitioner's rights to be tried by an impartial jury, before overruling these motions.

The petitioner argues that his constitutional guarantee, to be tried before an impartial jury was greatly jeopardized when the credibility of four (4) of the government witnesses, used against him, had already been established before eight (8) of the jury panel and before six (6) of the jurymen, who tried his case. The fact that four (4) government witnesses, who testified against petitioner, had previously testified before the same jury panel; and one or more of these witnesses had testified before six (6) of the

jurors, who tried petitioner, clearly establishes that at least six (6) of the jurors had already passed upon the credibility of one or more of these government witnesses.

In order to have acquited petitioner, it would have been neccessary for these six (6) jurors to give no weight or credibility to these government witnesses. This would seem very unlikely, after such jurors had already found other defendants guilty, charged with the same or similar offenses, based upon the testimony of these witnesses.

In the case of *Harbold v. U.S.*, 255 F. 2d 202 (10th C.C.A. 1958), the defendant was charged with a narcotic violation, in which some members of the convicting jury had heard two (2) prior narcotic cases, in which the same government witnesses had testified. The appellate court, in taking this assignment of error into consideration, said as follows:

> "On voir dire the jury were told, in the presence of counsel, that some of the government witnesses who had testified in prior narcotic cases would probably be witnesses in this case, and they were asked to state whether that fact would in any way affect their decision. The jury agreed it would not, and when the court inquired whether there was any challenge for cause, counsel answered in the negative." (supra, p. 205)

In this case, the Court did not render an opinion directly in point with petitioner's position, however, it did hold that due to the fact that the trial court used proper precautions, on voir dire, that the rights of the accused had been protected. This opinion clearly indicates that had not the trial court taken precaution-

ary measures, on voir dire, that the accused rights, to an impartial jury, would have been violated.

This same questioning, as presented by petitioner, was also raised in the case of *Belvin v. U.S.*, 12 F. 2cl 548 (4th C.C.A. 1926). The defendant in the Belvin case moved to exclude jurors on the grounds that they had served in other cases involving similar offenses and resting on evidence of the same witnesses. The court held that the trial court did not abuse his discretion, in that:

> "The trial judge, before passing upon the motion, examined each juror under oath as to whether he was so prejudiced in favor of the government witnesses, as to affect his judgment, and being assured to the contrary, overruled the motion." (supra, p. 549)

Petitioner's jury, on voir dire, were never advised that four (4) government witnesses, who had testified in prior narcotics cases, would probably be witnesses in this case, and were therefore never qualified as to whether or not this circumstance would affect their decision. The Honorable Trial Court, knowing these facts and circumstances, failed to use any protective procedure with respect thereto, during voir dire, which materially prejudiced petitioner's right to be tried by an impartial jury.

II.

Petitioner further contends that the Honorable Trial Court, during the trial of this case, exceeded his judicial functions by taking over the questioning of government witnesses, particularly when such questions, propounded by the Trial Court, were not

germane to the issues, and were irrelevant, redundant and prejudicial.

The Honorable Trial Court interrupted the testimony of the government witness, Raymond Potter, and propounded questions to him, in front of the jury, which petitioner contends, prejudiced his rights to a fair and impartial trial, R. 32 and 33.

The Honorable Trial Court again took over the questioning of government witness, Charles D. Casey, after cross examination, and propounded questions and illicited answers which were highly irrelevant, immaterial and prejudicial. Record 42 and 43.

Taking into consideration the First Proposition before this Honorable Court, coupled together with the questions propounded to government witnesses, by the Honorable Trial Court, created a circumstance, which deprived petitioner of a fair and impartial trial, by an impartial jury, as provided under the Constution of the United States of America.

Certainly the questions propounded by the Honorable Trial Court, strengthened, in the eyes and minds of the jury, the credibility of those witnesses, and gave greater weight to their testimony.

In the case of *Baker, et al. v. United States,* 156 Federal Reporter, 2d Series, 386, 1946, the court held that the conduct of the trial judge must be complete disinterestedness; and that if he fails to do so, the judgment will be reversed. We cite from the syllabus, as follows.

1. CRIMINAL LAW — 1166½ (1)

It is of the essence of a "fair trial" that trial judge conduct it with complete disinterestedness, and if he fails to do so, the judgment will be reversed.

Petitioner contends that the Honorable Trial Court effectively closed the door to petitioner's right to a fair and impartial trial, when he took over the questioning of government witnesses, Raymond Potter and Charles D. Casey; and that such questions and statements by the Honorable Trial Court, amounted to an abdiction of judicial functions, to prosecutor. This position of petitioner is further strengthened, in view of the questions raised in petitioner's First Proposition.

III.

The mandate of the Circuit Court of Appeals, Tenth Circuit, handed down on the 12th day of October, 1961, held, under the circumstances, of petitioner's failure to exercise any challenge for cause, and by his use of only half of his peremptory challenges, that petitioner had waived the right to complain that he was not tried by an impartial jury.

The petitioner contends that his Motion to Quash the Jury Panel, gave sufficient notice to the Honorable Trial Court that he did not intend to waive his rights under the Sixth (6) Amendment of the Constitution of the United States of America. Further arguing that a strong presumption is raised against a waiver of fundamental rights. This position was taken in case of *Himmel-*

Jarb v. United States, 175 F. 2d 924, 1949. We quote from the syllabus as follows:

9. Criminal Law — 306

A strong presumption is raised against a waiver of fundamental rights by an accused.

10. Criminal Law — 633(1)

The constitutional rights of an accused are jealously and vigilantly guarded.

The petitioner further contends that the issues in his case were highly conflicting, in fact, so much so that the jury was unable to agree on a verdict the first time he was tried.

The petitioner argues that the errors assigned in Propositions one and two, possessed an influencing affect upon his jurors, and entitled him to a reversal by the review court. In the case of *Homan v. United States*, 279 F. 2d 767, 1960, the Court stated as follows:

1. Criminal Law — 1186(4)

Errors of trial court which might be prejudicial in close criminal case, in sense of being capable in such situation of possibly affecting result, can well be without any such rational possibility in a strong case, and may not thus entitle defendant to reversal of his conviction, but reviewing court must be able to say with fair assurance that error complained of could not, with natural operation in total setting and proceedings had, be regarded as having an influencing effect. Fed. Rules Crim. Proc., Rule 52(a), 18 U.S.C.A.

It is contended by petitioner that the errors assigned in Propositions one and two, are *plain error*, and no exceptions are necessary to invoke a review of the entire record by the Supreme Court

of the United States. This Honorable Court, in the case of *United Brotherhood of Carpenters and Joiners of America, Petitioner, v. United States of America, 330 U.S. 395, 1946, stand as follows:*

> Appeal, 1176 — necessity for exception — plain error. 9. That exception was not taken to a failure to give a requested charge on a vital phase of a criminal case and affecting the substantial rights of defendants, does not preclude the Supreme Court of the United States from entertaining the objection.
>
> Appeal, 1084 — assignment of error — necessity. 10. The Supreme Court has power to notice a plain error though it is not assigned or specified.

See *Crauford v. United States*. 198 F. 2d 976, 1952.

The petitioner further contends that the fact that the reviewing court held that he waived his right to complain that he was not tried by an impartial jury, is not consistant with the rulings of this Honorable Court or some of the other United States Circuit Courts of Appeals. This Honorable Court has held that before error without prejudice is no ground for reversal is applicable, it must clearly appear that an error challenged did not prejudice, and could not have prejudiced. We cite from the body of the opinion of the case of *Harry Berger, Petitioner v. United States of America*, 295 U.S. 78-89, 1934.

> A defendant accused of crime is entitled to a fair and impartial trial.
>
> Graves v. United States, 150 U.S. 118, 37 L. ed. 1921, 14 S. Ct. 40; Wilson v. United States, 149 U.S. 60, 37 L. ed. 650, 13 S. Ct. 765; Hall v. United States, 150 U.S. 76, 37 L. ed. 1003, 14 S. Ct. 22; People v. Slover, 232 N.Y. 264, 133 N.E. 633; People v. Eposito, 224 N.Y. 370,

121 N.E. 334; People v. Malkin, 250 N.Y. 185, 164 N.E. 900; Johnson v. United States (C.C.A. 7th) 215 F. 679, L.R.A. 1915A, 862; 3 Wigmore, Ev. 1808.

It is only when the fact so clearly appears that an error challenged did not prejudice, and could not have prejudiced, the complaining party, that the rule that error without prejudice is no ground for reversal is applicable.

Section 269 of the Judicial Code, as amended (U.S.C. title 28, 391) provides:

"On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial right of the parties."

It is accordingly submitted that the errors assigned in Propositions one and two, constituted *plain error*, and the petitioner, by reason thereof, was denied a fair and impartial trial before an impartial jury.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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